No. 78-1631

In the Supreme Court of the United States

OCTOBER TERM, 1978

LEONARD BERLIN,

Petitioner,

vs.

GILBERT NATHAN, HARRIET NATHAN, FRED BENJAMIN and STUART SHAPIRO,

Respondents.

BRIEF OF THE CHICAGO MEDICAL SOCIETY, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

JONATHAN T. HOWE
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Attorney for Amicus Curiae

Of Counsel:
JENNER & BLOCK

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, and Regulations

Other Authorities

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1631

LEONARD BERLIN,

Petitioner.

vs.

GILBERT NATHAN, HARRIET NATHAN, FRED BENJAMIN and STUART SHAPIRO,

Respondents.

BRIEF OF THE CHICAGO MEDICAL SOCIETY, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

The Chicago Medical Society files the following amicus brief in support of the Petition for Writ of Certiorari sought by Leonard Berlin. Amicus curiae has filed letters with the Clerk from all parties granting consent to the filing of this brief.

INTEREST OF AMICUS

The amicus curiae has an interest in the present case for two reasons:

1. The decision of the Illinois Appellate Court denies the members of the Chicago Medical Society, of which Dr. Berlin is a member, any effective remedy for injury inflicted by frivolous litigation; and

2. The decision will exacerbate the already severe malpractice crisis in Illinois and elsewhere in the country, increasing the likelihood that members of the Society will be involved in a frivolous claim and encouraging the growth of already inflated medical malpractice premiums, to the economic and social detriment of the patient.

STATEMENT OF THE CASE

Dr. Leonard Berlin is a Board-certified radiologist. In October 1973, he reviewed and interpreted X-rays taken of Mrs. Harriet Nathan's dislocated finger. Mrs. Nathan was thereafter treated by other doctors.

Some months later, Mrs. Nathan's husband, an attorney, telephoned Dr. Berlin and told him that he would be named as a co-defendant in a malpractice suit which he was about to bring against one of the physicians who had treated his wife.

In October 1975, defendant-respondents Fred Benjamin and Stuart Shapiro filed a medical malpractice suit in the Circuit Court of Cook County, on behalf of Mrs. Nathan, against Dr. Berlin, Dr. William Meltzer and Skokie Valley Community Hospital. Prior to the preparation of the filing of that suit, Mrs. Nathan's attorneys did not contact any of the physicians who had treated Mrs. Nathan,

nor did they attempt to do so. Moreover, at the trial of this cause, attorney Benjamin admitted that he had filed the complaint against Dr. Berlin without having acquired any evidence or information to support the allegations of medical malpractice that were made against Dr. Berlin in the complaint. Likewise, Mrs. Nathan admitted that the physicians whom she had subsequently engaged had never suggested that Dr. Berlin's services had been improper in any way.

On October 22, 1975, shortly after the filing of Mrs. Nathan's lawsuit, Dr. Berlin filed suit against respondents in the Circuit Court of Cook County, which consolidated that suit with Mrs. Nathan's medical malpractice action. On the date set for trial, Mrs. Nathan voluntarily dismissed her suit. Dr. Berlin's amended complaint was then tried to a jury, which returned a verdict in his favor, awarding him Two Thousand Dollars ($2,000) actual damages and Six Thousand Dollars ($6,000) punitive damages. In response to special interrogatories, the jury found that each of the defendants had been guilty of willful and wanton conduct in filing their suit against Dr. Berlin.

The Illinois Appellate Court reversed, holding that Dr. Berlin should have brought a common law action for malicious prosecution. The Appellate Court made no reference whatsoever to the facts adduced at the trial, but relied solely on the pleadings, holding that Dr. Berlin had not stated a cause of action. The Appellate Court further held that, in order to plead such a cause of action, it must be alleged that (a) the plaintiff in the prior suit had acted maliciously and without probable cause, (b) the prior suit had terminated in favor of the defendant therein (that is, the plaintiff in the subsequent action such as the case at bar), and (c) the latter must be shown to have suffered "special injury" of a kind not necessarily found in any and

all suits prosecuted to recover for like causes of action. Applying these highly restrictive and ancient common law standards, the Appellate Court held that Dr. Berlin had failed to plead that the prior cause had terminated in his favor (since instead it had been dismissed by Mrs. Nathan) or to plead that he had suffered "special injury." Notwithstanding the fact that petitioner had pleaded that respondents had charged and alleged professional malpractice in their complaint against him "with reckless disregard as to [their] truth or falsity," the Appellate Court held that such pleading was not sufficient to allege "malice."

Dr. Berlin filed his Petition for Leave to Appeal to the Illinois Supreme Court, and that Petition was denied. Dr. Berlin moved for reconsideration, and that Motion was also denied.

REASONS FOR GRANTING THE WRIT

In reversing the jury verdict against the defendants for bringing their malpractice suit in a willful and wanton manner, the Illinois Appellate Court denied Dr. Berlin, and other similarly situated physicians and surgeons, an effective redress for an actual proven injury, thus denying him due process of law and raising certain constitutional issues which the Illinois Supreme Court was obligated, but refused, to hear. In addition, the Illinois Appellate Court's decision will aid and abet the filing of baseless suits and thereby worsen the already severe malpractice crisis in the United States.

I.

THE RULING OF THE ILLINOIS APPELLATE COURT CONSTITUTED A DENIAL OF DUE PROCESS, REQUIRING THAT THE ILLINOIS SUPREME COURT HEAR THE CASE.

A. The Due Process Clause Of The Fourteenth Amendment Requires That The States Provide Some Remedy To Those Who Have Suffered Injury To Their Liberty And Property.

This Court has long recognized that the right to due process reflects a fundamental belief that society should provide an orderly means for the redress of grievances. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), *Schroeder* v. *City of New York*, 371 U.S. 208 (1962). Indeed, our political and social institutions are premised on the view that civil society exists so that rights and responsibilities can be allocated according to law and disputes may be

settled without resort to violent means. Justice Harlan articulated this theory:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts, individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. *Boddie* v. *Connecticut*, 401 U.S. 371, 374 (1971).

Recognition of the importance to society of an orderly resolution of disputes suggests that the right to recover damages for a wrong committed against a member of society is "fundamental." As the Court recognized in *Schroeder* v. *City of New York*, 371 U.S. 209, 212 (1962), the right to be heard is "one of the most fundamental requisites of due process." Furthermore, the right to a remedy is meaningless unless it provides for the vindication of rights in the courts or some quasi-judicial body. *Boddie* v. *Connecticut*, 401 U.S. 371, 374 (1971). The failure to provide any effective remedy through one of these bodies for a wrong recognized by society violates basic values "implicit in the concept of ordered liberty" [*Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937)], and therefore constitutes a denial of due process of law.

In protecting this right, this Court has always carefully scrutinized cases where the state has sought to remove a common law remedy by legislation. In *New York Central R. Co.* v. *White*, 243 U.S. 188 (1917), this Court reviewed the constitutionality of a New York workman's compensation statute which denied a common law suit to both employer and employees in return for a regularized compensation schedule. The Court recognized that it had to determine whether "the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice." *Id.* at 202. While not ruling directly on the issue, the Court "doubted whether the State could abolish all rights of action . . . without setting up something adequate in their stead." *Id.* at 201. Since the Court found that New York had provided an adequate substitute, there was no reason to reach the due process issue.

The Court faced a similar issue just last term in deciding *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 98 S. Ct. 2620 (1978). In *Duke Power*, appellees challenged the constitutionality of the Price Anderson Act. That Act sets a maximum limitation on liability for nuclear accidents resulting from the operation of a privately-owned but federally-funded nuclear power plant. In return, the power companies indemnified under the Act are required to waive all legal defenses in the event of an accident. *Id.* at 2626. The Act also obligated Congress to "take whatever action is deemed necessary and appropriate to protect the public" from the consequences of a nuclear accident. *Id.* at 2626. As in *White*, this Court found that it was unnecessary to confront directly the question whether the government must provide an adequate substitute for the common law remedy that had been extinguished. However, the Court did emphasize that the "assurance" of a $560 million fund and the waiver of defenses were "a fair and reasonable substitute" for the common law remedy. *Id.* at 2640.

The emphasis on the *quid pro quo* element found in both *White* and *Duke Power* suggests that the state must provide *some* remedy for a wrong inflicted on one who suffers an actual injury. Any "arbitrary or unreasonable" failure to provide compensation for such damage constitutes a denial of due process of law.

B. In Defending Himself Against A Baseless Malpractice Suit, Dr. Berlin Incurred Substantial Damages Which He Was Entitled To Recover From The Defendant.

A physician or surgeon who is required to defend himself against a baseless malpractice claim necessarily incurs substantial damages. First, malpractice suits damage a physician's reputation. The mere filing of a claim often brings unfavorable publicity and questions regarding the physician's competence and ethical standards. Moreover, the damage often persists even if the physician is ultimately successful in defending the action. Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions,* 45 Fordham L. Rev. 1004, 1015 (1977).

The Court has recognized that the right to maintain one's reputation is a "fundamental personal right." *Shelton* v. *Tucker,* 364 U.S. 479, 489 (1960). While the Court's previous decisions in the privacy area have chiefly concerned marriage, procreation, family relationships and child raising, *Roe* v. *Wade,* 410 U.S. 113, 152 (1973), the Court has also recognized that privacy generally protects the "right to be let alone." *Doe* v. *Bolton,* 410 U.S. 179, 213 (1973) (Douglas J., concurring) citing, *Olmstead* v. *United States,* 277 U.S. 438, 478 (1928) (Holmes, J., dissenting). In *Rosenblatt* v. *Baer,* 383 U.S. 75, 92 (1966), Justice Stewart articulated society's interest in protecting reputation:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less

> recognition by this Court as a basic of our constitutional system.

Since, as this Court recognizes, the right to protect one's reputation lies at the heart of a system of ordered liberty, due process requires that the state provide individuals with a means of protecting themselves against groundless attacks against their reputation.

Closely related to damage to reputation is the infliction of severe emotional distress. Birnbaum, *supra,* at 1015. The physician or surgeon who is the object of a frivolous malpractice suit often feels intense frustration and anxiety. In some cases such suits have led physicians to change their attitudes regarding their professional practice and even their outlook on life. Report of the Secretary's Commission on Medical Malpractice, Department of Health, Education and Welfare, January 16, 1973, DHEW Publication (O.S.) 73-88, at 12 (hereinafter cited as HEW Report). In addition, the physician has to spend a large amount of time and energy helping to prepare his defense. This effort is most often contributed at the expense of his professional practice. Birnbaum, *supra,* at 1015.

Finally, the filing of a groundless claim often results in an increase in the physician's malpractice insurance premiums regardless of the outcome of the suit. In Illinois, for instance, the mere filing of a suit may subject the physician to surcharges or coverage restrictions if the defendant is insured under the Illinois State Medical Inter-Insurance Exchange (ISMIE). If the defendant is insured by the other major malpractice insurers, the Medical Protective Company, he incurs a 30% to 50% surcharge on his annual premium whenever a new suit is filed against him.

C. The Holding Of The Illinois Appellate Court, In Denying Dr. Berlin Any Effective Remedy, Constituted A Denial Of Due Process And Made It Necessary That The Illinois Supreme Court Hear The Case.

The holding of the Illinois Appellate Court so restricted the grounds for bringing a suit against one who brings a groundless claim as to effectively deny Dr. Berlin any remedy. In reversing the jury verdict in favor of Dr. Berlin, the court concluded that the only remedy for the victim of a groundless claim is an action for malicious prosecution. In this case, the court concluded Dr. Berlin had no remedy because he had failed to meet the requirements for bringing such an action. In particular, Dr. Berlin did not demonstrate that the action terminated in his favor or that he incurred special damages.

The requirements suggested by the Illinois Appellate Court make it almost impossible for any physician—or other professional person—to bring a suit for malicious prosecution. The requirement that the action terminate in the defendant's favor means that the plaintiff can always trade on the nuisance value of his frivolous suit and, if he is unsuccessful in exacting his nuisance settlement, he can frustrate a physician's countersuit by finally dismissing his claim with prejudice—the exact course of events in Dr. Berlin's case. More importantly, courts have generally found special damages in a malicious prosecution action only when there is an arrest, an attachment, an appointment of a receiver, a writ of replevin, or an injunction. Birnbaum, *supra*, at 1021. Yet these events almost never occur in a malpractice action. As one commentator has stated:

> In jurisdictions that continue to apply the strict requirement of proof of special injury, the physician's ability to assert a cause of action for malicious prosecution is illusory, in most cases, because the patient's suit against a physician for malpractice does not usually involve a civil arrest of the physician, seizure of the physician's property or any recognized special injury to the physician which would not ordinarily result in all suits prosecuted for like causes of action. Birnbaum, *supra*, at 1021, n. 120.

Furthermore, the Illinois Appellate Court's suggestion that section 41 of the Civil Practice Act, Ill. Rev. Stat. 1977, ch. 110, § 41, provides an adequate remedy for Dr. Berlin misconceives both the nature and purpose of the section. Section 41 provides that the defendant can recover attorney's fees and expenses in the original action if the allegations made against him were without probable cause. Yet those costs are wholly inadequate to compensate the victim of a baseless claim, since they fail to provide for damage to reputation or business practice and infliction of emotional distress. Birnbaum, *supra*, at 1022. Recognizing this limitation, the Illinois courts have concluded that the section is not intended to prevent frivolous or vexatious law suits. *Sarelas* v. *Alexander*, 132 Ill. App.2d 380, 270 N.E. 2d 558 (1971).

This Court has recognized that the action of a state court in enforcing a substantive common law rule "may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process." *Shelley* v. *Kraemer*, 334 U.S. 1, 17 (1948). The action of the Illinois Appellate Court represents just such a case. In concluding that the only remedy for the victim of a baseless claim is an illusory common law remedy, the Court denied Dr. Berlin any redress through orderly means for the wrong done against him. Since the touchstone of our legal system is the right to recover for acknowledged wrongs, the action constituted a denial of due process.

The due process issue raised by the Appellate Court's action requires that the Illinois Supreme Court hear the case. Article VI, § 4(c) of the Illinois Constitution of 1970 grants an appeal as of right if there is a question under the United States Constitution which arises for the first time in and as a result of the action of the Illinois Appellate Court. This Court should accordingly remand the case to the Illinois Supreme Court with instructions to hear the case. In addition, it should direct the Illinois Supreme Court to consider whether the remedies provided under state law in the circumstances of this case meet the requirements of the due process clause.

The Illinois Appellate Court, in attempting to vindicate the critical right of access to the courts for those wronged in our society, has effectively denied that right to a particular segment of our society desperately in need of such assistance. In so doing, they have created an unconditional right on the part of plaintiffs and their attorneys to bring vexatious and frivolous lawsuits which damage the physician's reputation and other legitimate interests while providing no concurrent benefit to society. This Court should act to remedy that situation by granting the Writ.

II.

THE INCREASING VOLUME OF FRIVOLOUS LITIGATION, WHICH EXACERBATES THE EXISTING MALPRACTICE CRISIS IN THIS COUNTRY, MAKES IT IMPERATIVE THAT THIS COURT GRANT THE WRIT.

The Illinois Appellate Court's ruling will have a profound effect on the medical malpractice crisis in this country. By denying doctors the only weapon available to them in most cases to counter baseless suits, the Illinois Appellate Court's ruling will encourage plaintiffs to file claims for their *in terrorem* settlement potential. These

additional claims will only increase the damage the malpractice crisis has already done to the health care delivery system in this country.

The malpractice crisis is reflected in the increasing number of suits brought for malpractice claims. In 1969, the major medical malpractice insurer had one claim pending for every 23 physicians it insured. By 1974, the ratio was one claim for every ten physicians. Epstein, *Medical Malpractice: The Case for Contract*, 1976 American Bar Foundation Journal 87, 88 n. 1. In New York, the number of malpractice suits against physicians rose from 564 in 1970 to 1200 in 1974. *Id.*

This upswing is also reflected in suits brought against members of the Chicago Medical Society. In one fourteen month period from January 1974 to March 1975, 1010 of Cook County's 7100 physicians were sued for malpractice. *Id.* Although the number of suits levelled off somewhat after 1975, there recently has been another surge in the number of suits brought. In the first six months of 1979, malpractice suits in Cook County have increased 32.9% over the same period in 1978. Cook County Jury Reporter, July 13, 1979.

The increase in litigation has led, in part, to dramatic increases in malpractice insurance premiums. Between 1960 and 1970, premiums for dentists rose 115%; those for hospitals, 262.7%; those for physicians other than surgeons, 540.8%; and those for surgeons, 949.2%. HEW Report, *supra*, at 13. The increases have continued into the 1970's. The average malpractice insurance premium rose from $1905 in 1973 to $7787 in 1975. Birnbaum, *supra*, at 1016. Between 1970 and 1975, the Illinois State Medical Society insurance program made a sevenfold increase in premiums for high risk physicians and surgeons. Epstein, *supra*, at 87 n. 1. Hospital insurance rates in Illinois

jumped 561% in 1975 alone, bringing the average premium per hospital bed to $1511 per year. *Id.*

In many instances, malpractice insurers have cancelled or substantially altered their policies so as to reduce coverage. One insurer dropped its New York coverage, while another cancelled the policies of 2000 doctors in Los Angeles. The nation's largest insurer changed from an "occurrence" policy to a "claims made" policy for all new insurance contracts made after July 1, 1975. The former coverage protects the physician against all suits which occur as a result of his or her practice. The claims made policy only protects the physician against those suits which are filed during the year of coverage, with an option to purchase for later years. While premiums under the claims made policy are lower than under an occurrence policy for new physicians, the premiums rapidly increase as the doctor accumulates experience and the chances increase that a former patient will bring suit. Moreover, retired physicians must buy insurance to protect themselves against claims which arise after they stop practicing. Epstein, *supra,* at 89 n. 5.

The malpractice crisis has had a profound impact on the delivery of health care in this country. First, it has contributed to the spiraling costs already found in the medical care area. Physicians necessarily have passed on 80 to 90% of the cost of malpractice insurance to the patient. One study indicated that physicians had raised their fees 96 cents per patient over a two year period to cover malpractice insurance costs. Birnbaum, *supra,* at 1016 n. 91. More fundamentally, the malpractice crises has changed the way that physicians practice. This phenomenon is generally referred to as "defensive medicine." "Positive" defensive medicine is the practice of conducting tests or diagnostic procedures which may not be medically justified but are ordered to defend against any

possible liability. "Negative" defensive medicine occurs when a physician does not conduct a test or procedure, even though it may be beneficial for the client, because he fears the possible liability arising from it. HEW Report, *supra,* at 14-15. Both practices appear to be increasing. In addition, physicians have demonstrated reluctance in using specially trained allied health care personnel, including technicians and nurses, because they fear the risks of increased liability arising from the harmful acts of their assistants. HEW Report, *supra,* at 17. Without question, defensive medicine leads to increased health care costs.

It appears that groundless or baseless malpractice claims play a key role in creating this situation. Such claims usually fall into three categories. First, there are claims brought solely as a result of a patient's spite or ill will. Second, there are claims brought by a patient in response to an unpaid bill. The client seeks to convince the physician to reduce or forego payment rather than having to report the claim to his insurance company and risk an increase in rates or outright cancellation of coverage. Finally, there are claims where the plaintiff seeks to force a settlement from the physician's insurance carrier for the nuisance value of defending the suit. Birnbaum, *supra,* at 1016-18.

There is substantial evidence that many malpractice claims fit into one of these categories. In one study conducted by the Department of Health, Education and Welfare, plaintiffs' lawyers were asked what percentage of malpractice claims had some merit. They responded that only 33.5% of such claims involved actual malpractice. HEW Report, *supra,* at Appendix 100-01. Another indication of the rise in groundless claims is that the number of suits which have been "marked off"—suits where there has been no activity by the plaintiff's attorney for a substantial amount of time, and therefore are more likely to be

baseless—has been increasing since 1970. Birnbaum, *supra*, at 1009. Finally, one study of insurance records revealed that 25% of all claims were closed without any payment. HEW Report, *supra*, at 10. This is particularly revealing in view of the propensity of insurance companies to settle claims rather than take them to trial.

One powerful means of reducing such baseless claims is to subject their progenitors to the risk of substantial damages. Such actions do not discourage plaintiffs with legitimate claims since the physician still must demonstrate that the action was without probable cause. Yet the Illinois Appellate Court has denied physicians any effective means of deterring such frivolous suits. In so doing, they have made physicians an inviting target for groundless claims, with the hope of nuisance settlement. Such action can only lead to a continuing increase in the number of malpractice suits with a concomitant decline in the delivery of health care services or increase in health care costs in this country. This situation makes it imperative that the Court issue a writ in this case.

CONCLUSION

The refusal of the Illinois Supreme Court to hear Dr. Berlin's case has denied him due process by removing the only available remedy for the wrong done to him by respondents. That denial will affect the entire medical profession by encouraging the filing of vexatious and unfounded lawsuits against physicians and surgeons who will necessarily have to expend considerable time and effort defending themselves. To the extent that physicians and surgeons will be diverted from their principal occupation of providing this nation with first-class medical care, the public will suffer through decreased availability of medical services and increased costs resulting from skyrocketing

malpractice premiums. Further, the increased burden on the judicial system of having to weed out unjustified litigation cannot be overlooked. For all these reasons, amicus curiae respectfully prays that this Honorable Court grant petitioner's request for a writ of certiorari.

Respectfully submitted,

JONATHAN T. HOWE
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Of Counsel:
JENNER & BLOCK

Dated: August 2, 1979